Decision 01-12-023 December 11, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company on an Expedited Basis for Exemption under Section 853 for Easements on PG&E Land Allowing Delta Energy Center, LLC to Maintain an Electric Transition Structure for the Delta Project and CPN Pipeline to Maintain Gas Facilities for the Delta Project and the Los Medanos Energy Center Project, or in the Alternative for Approval of Easements under Section 851.	Application 01-07-031 (Filed July 26, 2001)

ORDER DENYING REHEARING OF DECISION 01-08-069

On September 6, 2001, Pacific Gas & Electric Company ("PG&E") filed an application for rehearing of Decision (D.) 01-08-69 ("Delta Project Decision"). PG&E also filed an application for rehearing on a related decision, D.01-08-070 ("CalPeak Decision"), which is the subject of a separate order today.

We have carefully considered all the arguments presented by PG&E and are of the opinion that good cause for rehearing has not been shown. We incorporate our discussion today in the CalPeak Decision, and conclude that no legal error has been demonstrated. We further deny PG&E's request to recategorize any further proceedings relating to our interpretation of General Order (G.O.) 69-C as a quasi-legislative proceeding. We also deny PG&E's request that we reconsider and vacate the Order to Show Cause issued on August 23, 2001 against PG&E.

PG&E's arguments focus on our interpretation of Public Utilities Code section 851 ("section 851") and G.O. 69-C. PG&E claims that the Delta Project Decision greatly limits the power that we gave to utilities under G.O. 69-C. Essentially, PG&E argues that the Delta Project Decision contradicts both prior Commission decisions and the express language of G.O. 69-C. In fact, PG&E contends that the Delta Project Decision prohibits any type of construction work on utility property without section 851 approval. As a result, PG&E argues that we should have followed quasi-legislative procedures in the Delta Project Decision because the drastic change in the scope G.O. 69-C has industry-wide implications. PG&E also contends that, in the interest of fairness, since our previous stance on G.O. 69-C and section 851 has been ambiguous, sanctions are not appropriate. PG&E's arguments fail for several reasons.

The Delta Project Decision does not contradict prior Commission decisions. On the contrary, several recent Commission decisions support our position in the Delta Project Decision. We have noted our concern in recent decisions that utilities appear to be issuing licenses pursuant to G.O. 69-C with the intention of later converting that license into a long-term obligation. (See D.00-12-006, at 1, 7 ("Telecom"); D.01-01-043, at 10 ("Katella"); D.01-03-064, at 7-8 ("Storage Pro").) By doing so, utilities are not following the advance review requirements of section 851. While we approved the section 851 transactions at issue in those recent decisions, we did not condone the G.O. 69-C process utilized by the utilities. Specifically, in the Storage Pro Decision we declared that "we wil1 deny future applications to encumber or dispose of utility property where the structure of the transaction was designed to circumvent the advance review requirements of § 851 or the appropriate environmental review." (Storage Pro, D.01-03-064 at 1-2.) Therefore, PG&E's contention that the Delta Project Decision conflicts with prior Commission decisions is without merit.

PG&E's assertion that the Delta Project Decision contradicts the express language of G.O. 69-C is also erroneous. The language of G.O. 69-C does not state whether a utility issuing a license under the "limited uses" provision of G.O. 69-C may make permanent modifications to utility property. (Resolution No. L-230 (July 10, 1985).) Therefore, we have the discretion to determine the scope of the application of "limited uses" in G.O. 69-C. As we have stated in prior decisions, undertaking a commitment with long term implications is not a "limited use" that qualifies for G.O. 69-C treatment. (See Telecom, D.00-12-006, at 7; Storage Pro, D.01-03-064, at 10.) In addition, contrary to PG&E's contention, the Delta Project Decision does not hold that minor site preparation work constitutes a permanent use that falls outside the scope of G.O. 69-C. Rather, we held in the Delta Project Decision and the related CalPeak Decision that utilities may not make permanent changes to utility property in anticipation of a section 851 application for a sale, lease or encumbrance of the property. (Delta Project, D.01-08-069, at 21-22; CalPeak, D.01-08-070, at 10.) Therefore, our interpretation of the scope G.O. 69-C does not contradict the language of G.O. 69-C.

PG&E also believes that we failed to provide it with notice and opportunity to comment, which is part of a quasi-legislative proceeding, as required under California law when we make new industry-wide policy. PG&E's argument is based on its assertion that the Delta Project Decision puts forth a new interpretation of G.O. 69-C that is inconsistent with our past decisions and with the language of G.O. 69-C. Thus, PG&E contends that we have repealed and reissued G.O. 69-C, an act that would affect all utilities under our jurisdiction. We did not repeal, amend or otherwise modify G.O. 69-C in the Delta Project Decision. Rather, we interpreted G.O. 69-C in a manner consistent with the language of G.O. 69-C and with recent Commission decisions. Therefore, PG&E's argument is without merit.

PG&E further argues that even if the Commission has the authority to amend G.O. 69-C in a ratesetting procedure, it should refrain from doing so. Essentially, PG&E believes that there should be a hearing before we make a "fundamental change in policy." (App. for Rehearing at 22.) We have already exercised our discretion in determining that a ratesetting process is appropriate for the Delta Project case. In addition, we did not amend G.O. 69-C in the Delta Project Decision. Therefore, our decision to classify this proceeding as a ratesetting procedure does not constitute legal error.

Lastly, PG&E argues that an Order to Show Cause should not have been issued against PG&E for conduct that was acceptable in prior Commission decisions. We stated in previous decisions that we would no longer permit utilities to issue a license pursuant to G.O. 69-C with the intention of later selling, leasing or encumbering utility property. (See Telecom, D.00-12-006, at 7; Katella, D.01-01-043, at Storage Pro, D.01-03-064, at 1-2.) Therefore, the Order to Show Cause does not violate the principles of fundamental unfairness. PG&E also contends that it may prevent the Commission from sanctioning PG&E under the doctrine of equitable estoppel. We have not yet sanctioned PG&E. Therefore, PG&E's equitable estoppel argument is premature. In any case, PG&E does not meet all of the requirements of the doctrine of equitable estoppel. PG&E was on notice of our prior decisions, where we warned utilities to follow the advance review requirements of section 851. (See D.99-08-007, at 1-2 ("Koch"); Telecom, D.00-12-006, at 1, 7; Storage Pro, D.01-03-06, at 1-2.) Therefore, we acted properly in issuing an Order to Show Cause.

No further discussion of PG&E's arguments is warranted.

Therefore **IT IS ORDERED** that:

1. Rehearing of D.01-08-069 is hereby denied.

This order is effective today.

Dated December 11, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ RICHARD A. BILAS
Commissioner